

Respondent's application for review states the issue on appeal as "Whether the ALJ abused his discretion in awarding temporary total disability." In respondent's brief before the Appeals Board (Board), it clarified that the issue involved temporary partial disability compensation instead of temporary total disability compensation. Respondent argues that the ALJ exceeded his jurisdiction when he ordered respondent to pay claimant temporary partial disability compensation because uncontradicted testimony proved claimant was offered full-time light work employment within his permanent restrictions but claimant chose, instead, to work only two to three hours per week.

Conversely, claimant filed a motion before the Board to dismiss respondent's appeal alleging it was frivolous. The claimant also requested the Board to make a finding that respondent's appeal violated K.S.A. 44-5,120(d)(5).¹ Claimant contends the ALJ's preliminary hearing order granting claimant's request for temporary partial disability compensation is not a preliminary hearing issue the Board has jurisdiction to review on appeal from a preliminary hearing order. Claimant argues that issue has been previously decided on many occasions by the Board over many years. Thus, the claimant argues respondent's appeal should be dismissed and the Board should find respondent in violation of the provisions of K.S.A. 44-5,120 (d)(5).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record, and considering the arguments contained in the parties' briefs, the Board makes the following findings and conclusions:

The Board agrees with the claimant that respondent's appeal should be dismissed. Like temporary total disability compensation, temporary partial disability compensation is intended solely as wage replacement. Thus, the ALJ has the authority to enter a preliminary hearing order for the payment of temporary partial disability compensation.²

The Board concludes, as it has on numerous other occasions, that it does not have jurisdiction to review a preliminary hearing finding that claimant is either temporarily and totally or temporarily and partially disabled from engaging in any type of substantial and gainful employment. The ALJ did not exceed his jurisdiction in granting claimant's request for temporary partial disability compensation because K.S.A. 44-534a specifically grants the ALJ that authority.³ Also, the issue of whether or not claimant is temporarily and partially disabled is not one of the jurisdictional issues listed in the preliminary hearing statute that grants the Board jurisdiction to review a preliminary hearing order.⁴ Therefore, the Board dismisses respondent's appeal.

¹ "(d) Fraudulent or abusive acts or practices . . . include, willfully, knowingly, or intentionally:
(5) bringing, prosecuting or defending an action for compensation under the workers compensation act or requesting initiation of an administrative violation proceeding that, in either case, has no basis in fact or is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."

² See Brown v. Lawrence-Douglas County Board of Health, WCAB Docket No. 205,848 (March 1996).

³ See K.S.A. 44-551(b)(2)(A).

⁴ See K.S.A. 44-534(a)(2).

Claimant also requested the Board to find respondent's appeal was frivolous and respondent committed an abusive act as contained in the provisions of K.S.A. 44-5,120 (d)(5). The Workers Compensation Act does not confer jurisdiction on the Board to decide an issue first raised on appeal before the Board. The Board only has jurisdiction to review final orders, awards, modifications of awards, or preliminary hearing orders made by the ALJ.⁵ The procedure to file a complaint under K.S.A. 44-5,120 is set out in K.S.A. 44-5,122(b). Claimant's request for the Board to make a finding that respondent violated K.S.A. 44-5,120(d)(5) is also dismissed because of the Board's lack of jurisdiction.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that it does not have jurisdiction to review, at this juncture of the proceeding, the temporary partial disability issue contained in the ALJ's September 4, 2001, Order for Compensation, and the review should be, and is hereby dismissed. The Board also dismisses claimant's request to find respondent in violation of K.S.A. 44-5,120(d)(5) for lack of jurisdiction.

IT IS SO ORDERED.

Dated this ____ day of October, 2001.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Ronald Laskowski, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁵ See K.S.A. 44-555c(a).